IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 231 of 1985

For Approval and Signature:

HON'BLE MR.JUSTICE A.R.DAVE
HON'BLE MR. JUSTICE MD SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)

Versus

DAUD SALE MAHMAD & 2 - Opponent(s)

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Appearance :
MS PAURAMI SHETH, A.P.P for Petitioner No(s).: 1.

MRS SHILPA J UNWALLA for Respondent No(s).: 1,3.
MR VIJAY H PATEL for Respondent No(s).: 2.
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CORAM : HON'BLE MR.JUSTICE A.R.DAVE
and
HON'BLE MR. JUSTICE MD SHAH

Date : 29/06/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE A.R.DAVE)

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1. Being aggrieved by the judgment and order dated 30th November, 1984 passed in Sessions Case No. 43/84 by the Sessions Judge, District Sabarkantha at Himatnagar, this acquittal appeal has been filed by the State of Gujarat.

2. Charge against the accused was framed on 15th October, 1984 to the effect that on 21st February, 1984 around 10 p.m., accused nos. 1 and 3 had attacked Sardarji Udaji at village Malkampa (Devipura) with an intention to cause his death and thereby they had committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code and accused nos. 1 and 2 had given incorrect information to police and had tried to destroy the evidence and thereby they had committed an offence under Section 201 of the Indian Penal Code and alternatively, all the three accused had conspired to commit an offence punishable under Section 302 of the Indian Penal Code and in pursuance of the said conspiracy, had committed an offence under Section 302 read with Section 120 B of the Indian Penal Code.

3. Bai Madhu, daughter of Shri Punjabhai Nathabhai and wife of Shri Hemtaji, was having an illicit relation with accused no. 2 and as Sardarji Udaji had come to know about the said fact, the accused had conspired to murder Sardarji Udaji so as to see that Sardarji Udaji does not reveal the said fact to the husband of Madhu.

4. As a part of the conspiracy, accused no. 2 had agreed to pay of Rs. 15,000/- to accused no. 1, who was a watchman. According to the case of the prosecution, from the amount paid to accused no. 1, he had bought several things. As a part of the conspiracy, accused no. 2 had called accused no. 1 and had told him that after committing murder of Sardarji Udaji at night, he should tie the dead body with a bundle of cotton and he should tear his own clothes and break his stick and, thereafter, on the same day, he should come to accused no. 2 and tell him that in his field four persons had come for the purpose of taking away cotton

and out of those four persons, two were having dharia whereas two persons were having sticks. He should further state that he had resisted those persons vigorously and out of the four persons one had fallen down and during the scuffle, his stick had also been broken. The remaining three persons had run away. Thus, according to the case of the prosecution, there was a conspiracy between accused nos. 1 and 2 for committing murder of Sardarji Udaji. It is the case of the prosecution that in pursuance of the aforestated conspiracy, as per the plan, Sardarji Udaji was murdered.

5. It is the case of the prosecution that on the fateful day, accused no. 1 had gone to the residence of Shri Ramesh Master and had taken a bed sheet and, thereafter, he went to a hotel where he had met Sardarji Udaji around 8 p.m. Alongwith deceased Sadarji Udaji, he had gone to the field of accused no. 2 and there they had smoked bidi. There accused no. 3 had also joined them and all the three had consumed liquor. Thereafter, accused no. 3 had given a stick blow on the head of Sardarji Udaji and second blow was given by accused no.1 on the back of the deceased. Thereafter, one more blow was given on the leg of the deceased and as a result thereof Sardarji Udaji had fallen down. Thereafter, accused no. 3 had given a stab blow with his knife on the stomach of Sardarji Udaji and, therefore, Sardarji Udaji died on the spot. Thereafter, as determined earlier, in the bed sheet , which had been brought from the residence of Shri Ramesh Master, some cotton had been put and a bundle had been prepared, which had been tied with the shoulders of the dead body of Sardarji Udaji. Moreover, a jar in which accused no. 3 had brought liquor was also kept in the bundle and a stick was also put there and, thereafter, as per the instructions given by accused no. 2, they had left the place and, thereafter, accused no. 1 had proceeded to the residence of accused no. 2.

6. Next day morning, i.e. on 22nd February, 1984, accused no. 1 and accused no. 2 had visited Modasa Rural police station and there accused no. 1 had filed an FIR Mark: 46/1, which was recorded by PSI, Shri Chimanlal I Trikmlal, and, thereafter, the said PSI had taken possession of two pieces of sticks and clothes

under panchnama, Exh. 24. The clothes, which had been taken by him, consisted of a shirt and a trouser, which bore blood stains. Thereafter, alongwith accused no. 1, the PSI had gone to the field of accused no. 2 where cotton had been grown. Dead body of Sardarji Udaji was found in the field of accused no. 2.

7. After the dead body of deceased Sardarji Udaji was found, inquest panchnama was prepared. Inquest panchnama report, Exh. 10, had been filled up and the dead body of Shri Sardarji Udaji had been sent to the Medical Officer, Primary Health Center, Modasa.

8. Thus, the case of the prosecution before the Trial Court was that by hatching a conspiracy, Sardarji Udaji was murdered by the accused and thereby the offences referred to hereinabove had been committed by all the three accused.

9. We have gone through the evidence and also the judgement of the Trial Court. The prosecution had given much importance to the confession of the accused recorded by the JMFC, Himatnagar, Exh. 39.

10. Learned A.P.P. Ms Paurami Sheth has relied upon the said confession as a piece of important evidence, whereby accused no. 1 has confessed his guilt and has also implicated accused nos. 2 and 3. It is the case of the learned A.P.P. that it was most improper on the part of the Trial Court to brush aside the said important piece of evidence, which was a confession before the Judicial Magistrate in accordance with Section 164 of the Criminal Procedure Code. Of course, she has very frankly admitted that except the said confessional statement, there is no other evidence on which the prosecution can rely upon.

11. Now, let us look at the confessional statement and the circumstances in which the confession was made before the Judicial Magistrate.

12. The investigation of the case was handed over to PI Shri Malik on 8th March, 1984. Thereupon it appears that the IO had made all possible efforts to find out the culprit. Possibly, he could not and, therefore, according to his own say,

he had contacted brother-in-law of accused no. 1. It is pertinent to note that at the time when the confessional statement was recorded by the Judicial Magistrate, the accused was supposed to be in judicial custody. IO Shri Malik has submitted in his examination-in-chief that as he wanted to interrogate accused no. 1, he had submitted an application, Exh. 49, to the learned Judicial Magistrate, (First Class), Modasa, so that he can have custody of accused no. 1 for the purpose of interrogation and the application was granted and the learned Judicial Magistrate was pleased to grant an order whereby the IO was permitted to interrogate and have custody of accused no. 1 on 15th and 16th march, 1984 and thereafter, at any time when he might require the accused for the purpose of interrogation. Such a direction had been given to the Sub-Jailer of the Jail where accused no. 1 had been lodged.

13. It is pertinent to note that upon the said application being granted, IO Shri Malik had very often taken physical custody of accused no. 1, though such a permission had never been granted by the Judicial Magistrate (First Class) to the IO. Thus, though the accused was in judicial custody, IO Shri Malik, had taken the accused to Modasa Police Station on several occasions, though, he was not permitted to do so.

14. In the cross-examination of the said IO, he has fairly admitted that very often accused no. 1 was taken from the judicial custody to Modasa Police Station during 15March, 1984 to 19th March, 1984. It is also pertinent to note that for the purpose of having confessional statement from accused no. 1, as per admission of IO Shri Malik during his cross examination, he had taken help of Shri Haji Mohammad who was brother of accused no. 1's wife till 17th March, 1984. It is also worth noting that during the said period, Shri Ambalal Upadhaya an MLA, had called the IO possibly in relation to the investigation of the said offence. Shri Ambalal Upadhaya, Member of Legislative Assembly of Modasa, though cited as witness, was not examined by the prosecution.

15. Ultimately, on 18th March, 1984, accused no. 1 expressed his desire to give

his confessional statement before the Judicial Magistrate. In the cross examination of the said IO, he has admitted that, on 18th March, 1984, accused no. 1 had shown his willingness to give his confessional statement and thereupon he had stopped interrogating the said accused.

16. The aforestated facts are of vital importance so as to know whether the confessional statement of accused no. 1 should be relied upon by the Court for the purpose of considering the same as evidence against the co-accused.

17. Upon examination of the aforestated facts, it is clear that accused no. 1 was in judicial custody and yet from time to time he was taken to Modasa Police Station by the Investigating Officer, as admitted by himself. It is also pertinent to note that the Investigating Officer had not taken proper permission from the Court for taking custody of accused no. 1 and yet accused no. 1 was taken out of judicial custody to the police station and possibly in the police station he had agreed to give the statement on 18th March, 1984. One should not ignore the fact that during the said period, according to the admission of the IO, brother-in-law of accused no. 1, Shri Haji Mohammad, had helped the IO for obtaining confessional statement. It is also pertinent to note that during the said period the IO had met Shri Ambalal Upadhaya, Member of Legislative Assembly, who, though cited as a witness, was not examined.

18. The aforestated facts possibly reveal that the confessional statement was not at the free volition of the accused but was because of some pressure, which might have been exerted on him by the IO or his brother-in-law, Shri Haji Mohammad. One cannot ignore the fact that in the instant case there is no eye witness at all. According to the prosecution, everything depends upon the confessional statement made by accused no. 1, whereby he not only implicates himself but also implicates accused nos 2 and 3. The entire story with regard to the offence has been narrated by accused no. 1 in his confessional statement. The said confessional statement had been subsequently retracted when the said accused did not plead guilty at the time when the plea with regard to his guilt

was recorded while framing the charge.

19. Even when his statement under Section 313 of the Criminal Procedure Code had been recorded, the accused did not admit his guilt as recorded in his confessional statement. In the aforestated circumstances, we have to examine whether the said confessional statement could have any evidential value.

20. There is one more factor against the prosecution and that is an application under Section 306 of the Criminal Procedure Code dated 14/15th May, 1984 (Exh. 52) submitted by the IO to the Judicial Magistrate (First Class) Himatnagar praying that accused no. 1 be pardoned as he was inclined to make full and true disclosure of the circumstances which were within his knowledge relating to the offence and part played by all other persons. The said application was submitted to the Judicial Magistrate (First Class) but no final order had been passed thereon.

21. Looking to the aforestated facts, in our opinion, the Trial Court rightly did not rely upon the confessional statement for the reasons, which can be given in a nutshell as under;

Before the confessional statement was made, accused no. 1 had agreed to give such a statement to the IO on 18th March, 1984, when, though he was supposed to be in judicial custody, in fact he was taken to the police station time and again as admitted by the IO himself. Moreover, during the period, when he was taken to the police custody, he was at Modasa Police Station. Either he was pressurised or he was given some inducement by the IO himself or by his brother-in-law, Haji Mohammad, and it appears that possibly so as to see that the IO keeps his word, in fact he had submitted an application below Exh. 52 for giving pardon to him as he had already made full and true disclosure of the whole circumstances within his knowledge relating to the offence and all other persons.

22. Otherwise, in our opinion, it was not necessary for the IO to submit an application below Exh. 52, under the provisions of Section 306 especially

when accused no. 1 had already made a confessional statement on 29th March, 1984 before the Judicial Magistrate, (First Class) Himatnagar and, more particularly, even when the charge had not been framed at that time, because the charge had been framed on 5th October, 1984. It is also pertinent to note here that the Judicial Magistrate, Himatnagar, before whom the confessional statement of accused no. 1 had been recorded, has also deposed in his deposition that on 26th and 29th March, 1984, when accused no. 1 was brought before him for getting his confessional statement recorded, and more particularly on 29th March, 1984, when the confessional statement was recorded, the accused was brought by IO Shri Malik and that denotes that the IO was having substantial control over accused no. 1.

23. It is a settled legal position that confessional statement should be made absolutely voluntarily and if there is any doubt to the Court that the confessional statement was made under any pressure or inducement, the Court should ignore the confessional statement. The Hon'ble Supreme Court has observed in the case of ASSISTANT COLLECTOR (HQ), CENTRAL EXCISE COLLECTORATE, COCHIN, (1997) 3 SCC, 721, that, if the Court believes that the confessional statement could have been caused by inducement, threat or promise, the Court should not rely upon such a confessional statement. It is clear in the instant case that accused no. 1 was taken to the police custody against the provisions of the Criminal Procedure Code and as the confessional statement was recorded during the said period, the Court has to be more careful while considering such a confessional statement in the light of law laid down by the Hon'ble Supreme Court in the case of BHARATBHAI ALIAS JIMI PREMCHANDBHAI Vs STATE OF GUJARAT, (2002) 8 SCC 447.

24. If one looks at the ratio of the said judgment of the Hon'ble Supreme Court, the confessional statement made by accused no. 1 can never be treated as a real confession as that was possibly obtained because of some pressure or

inducement as found by the Trial Court. We also, upon perusal of the entire evidence, share the same view. We also come to the conclusion that the Trial Court rightly did not convict the accused on the basis of the confessional statement made by accused no.1. Except the confessional statement made by accused no. 1, the prosecution is not having any other evidence to substantiate the charges levelled against the accused. Possibly for the abovestated reasons, the confessional statement of accused no. 1 has been rightly not relied upon by the Trial Court. We do not find any substance in this appeal and, therefore the appeal is dismissed.

(A.R. DAVE, J.)

(M.D. SHAH, J.)

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